

AGENDA

State of Wisconsin Livestock Facility Siting Review Board Teleconference Meeting

December 19, 2008
12 p.m. to 2 p.m.
DATCP, Boardroom 106
2811 Agriculture Drive, Madison

12:00 p.m. CALL TO ORDER—Jim Holte, LFSRB Chair

- Open Meeting Notice
- Approval of Agenda
- Approval of November 21, 2008, Meeting Minutes

Van Dyke v. Racine County, Docket No. 08-L-02—Jim Holte

- Review and Approve Decision

Discussion of Changes to Board Bylaws and Appendix – Cheryl Daniels, Board Attorney

Board Schedule and Future Agenda Items

- Schedule of 2009 Meetings—January 16, February 20, March 20, April 17, May 15, June 19, July 17, August 21, September 18, October 16, November 20, and December 18
- Future Agenda Items

2:00 p.m. ADJOURN

**DRAFT MINUTES
LIVESTOCK FACILITY SITING REVIEW BOARD
MEETING
November 21, 2008
Boardroom 106, 2811 Agriculture Drive, Madison, WI**

Vice-Chair Johnson chaired today's meeting and called it to order at 10:07 a.m. Other LFSRB members present were Jim Holte (by phone), Fran Byerly (by phone), Lee Engelbrecht, Bob Selk, Bob Topel, and Jerry Gaska. A quorum was present. DATCP staff present were Cheryl Daniels and Lori Price.

Call to order

Johnson stated the meeting agenda was publicly noticed, as required, and then presented the agenda for approval. Engelbrecht moved to approve the agenda, and Gaska seconded the motion. The motion passed.

Johnson presented the September 19, 2008, meeting minutes for approval. Gaska made a motion to approve the minutes as written, and Selk seconded the motion. The motion passed.

Larson Acres, Inc. v. Town of Magnolia, Docket No. 07-L-01, circuit court case status—Cheryl Daniels, DATCP

Daniels reported that the status of this case has not changed since her last report, and she is still waiting on the Circuit Court Judge's decision. She will send a copy of the petitioner's reply brief to the board members once she receives it from Bob Hunter.

Van Dyke v. Racine County, Docket No. 08-L-02: case review process, identification of issues on appeal, discussion, LFSRB decision, and set date for LFSRB signoff of final written decision on case—Andy Johnson

Johnson reported that Racine County properly approved a livestock siting zoning ordinance that is consistent with Wisconsin Statute 93.90 and ATCP 51. The ordinance does not go beyond the limits or authorities of ATCP 51. The request for review sent by Van Dyke met the requirements for appeal and submittal to the LFSRB. Daniels sent out the request for the county record of decision making, and the board received the record in early November. The board has until early January to publish its final decision in this case. Gaska asked about the local government's minutes from the June public hearing that were missing from the record. Daniels responded that the June hearing was not properly noticed to the public so the county may have chose not to include them as part of the record since another public hearing, which was properly noticed, took place in August. Johnson continued that the board will review if the challenge to the county decision is valid based on the record of decision making.

Before the board determined if the challenge was valid, they identified the issues on appeal as the adequacy of the nutrient management plan, specifically does the application contain sufficient information and documentation to demonstrate compliance with the nutrient management standards. The board began the discussion by noting that there was an inconsistency in the number of acres

available for manure spreading listed in the application and the number of acres listed for spreading in the nutrient management plan. While the number of acres listed in the nutrient management plan was sufficient for the current number of animal units at the facility, that number was not sufficient for the proposed expansion. The board members could not locate anywhere in the record, other than what was mentioned in the application, proof of the total acreage needed for spreading to meet the proposed expansion. The board members reviewed in its *Ronald S. Stadler v. Crawford County* decision that the number of acres for manure disposal matched the maximum number of animal units, and that decision reflected the statutory framework for livestock siting. The board members also discussed the fact that the county granted the permit knowing that the acreage available for spreading was insufficient, but that the county does have the option to review the nutrient management plan as expansion occurs and possibly deny the permit if it doesn't meet the ordinance. Some of the board members expressed concern on whether the county would fulfill this monitoring duty and whether the importance of the nutrient management plan might be lessened if the LFSRB agrees with this plan of action. The board members also discussed if the projections of the nutrient management plan was a "sound" science to follow and whether Condition #8 in the letter granting the permit would satisfy the lack of acreage for spreading. Condition #8 states that if there is not sufficient acreage, the facility operator must obtain additional agreements with other landowners to spread manure. There was also discussion on whether the LFSRB needed to see copies of the agreements, and the possibility that agreements could expire. The board members agreed that a nutrient management plan has to be in place for the number of animal units listed in the expansion, and that the plan and land base agreements will change to meet the number of acres needed for manure disposal as the facility expands, with the burden of monitoring placed on the local government. The plan also gives the public assurance that the owner has addressed manure disposal. At this point, the LFSRB took a lunch break.

After lunch, Gaska noted that the Employee Training Plan and Environmental Incident Response Plan were not provided in the application. However, the fact that these items were not in the application process will not be considered as part of the appeal the board is reviewing at today's meeting.

Johnson then recapped the board's discussion prior to the lunch break and then asked Daniels if there was any other focus in this case that the board may want to consider. Daniels commented that the board may want to ask if the law has any other perceived burdens in this case that future applicants may want to consider.

Selk made a motion that the board find the challenge is valid and the decision is reversed because the application does not demonstrate compliance with the nutrient management standards established under Wisconsin Statute 93.90 (2) (a) and ATCP 51.16 (1). Engelbrecht seconded the motion. The motion passed unanimously.

The board then addressed the petitioner's concerns numbered 1-29 to see if additional comment was needed, particularly as guidance for future applicants. The board first discussed concerns numbered 1-25 and concluded that some of the concerns addressed the NRCS 590 standard, which was out of the board's jurisdiction, and others addressed the lack of acreage available so that would have been covered under the board's early motion. Engelbrecht made a motion that the LFSRB not take up the

individual challenges numbered 1-25 in the aggrieved person's statement of position because the board has generally addressed these issues in its first motion. Selk seconded the motion. The motion passed unanimously. The board then discussed the petitioner's concerns numbered 26-29. Topel made a motion that the LFSRB does not have jurisdiction to take up issues numbered 26-29 of the aggrieved person's statement of position since the ordinance is not one adopted as more stringent than state standards under Wisconsin Statute 93.90 (3) (ar). Gaska seconded the motion. The motion passed unanimously.

Daniels stated that the board's proposed decision would be sent to the interested parties in this case. The LFSRB will meet on December 19th by teleconference call to review the context of the order containing the board decision, revise it if necessary, and approve it.

Board schedule and future agenda items

At the December 19th meeting, the board will also review their bylaws to see if changes need to be made. Daniels will send out a reminder to the board asking for their suggested bylaw changes prior to the December 19th meeting.

Adjourn

Selk moved to adjourn the meeting, and Engelbrecht seconded the motion. The motion passed. The meeting ended at 1:15 p.m.

Respectfully submitted,

Bob Selk, Secretary

Date

Recorder: LP

DRAFT

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD
2811 Agriculture Drive, P.O. Box 8911
Madison, Wisconsin 53708-8911

IN THE MATTER OF AUDREY VAN DYKE, Aggrieved Person v. RACINE COUNTY, Political Subdivision	DOCKET NO. 08-L-02 DECISION
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BEFORE the Wisconsin Livestock Facility Siting Review Board:

James Holte, Chair
Andrew Johnson, Vice Chair
Robert Selk, Secretary
Fran Byerly
Lee Engelbrecht
Jerome Gaska
Bob Topel

NATURE OF THE CASE

Aggrieved Person Audrey Van Dyke ("Van Dyke") filed a challenge against the political subdivision Racine County ("County") with the Wisconsin Livestock Facility Siting Board ("Board") received on September 25, 2008. In the challenge, Van Dyke alleged that the County had approved a livestock facility siting permit for Applicant Noble View Farms Inc., ("Noble") although the applicant's plan for nutrient management, under s. 93.90(3), Stats., was inadequate under the standards of chapter ATCP 51, Wis. Adm. Code. Van Dyke filed the appeal as an "aggrieved person" under s. 93.90(5)(a), Stats., as a person who owns land within 2 miles of a livestock facility that is proposed to be expanded. In addition Van Dyke sent a position statement with her challenge.

On September 25, 2008, under the authority of the Board and its bylaws, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the County, Van Dyke and Noble. The Request for Review included a date of October 31, 2008 for all Statements of Position to be postmarked to the Board.

On October 31, 2008, the County sent a copy of the decision-making record for the Noble case, with a certificate of record from the Racine County Assistant Corporation Counsel. The county sent a position statement with its filed record.

The Board held a properly noticed meeting on November 21, 2008. Included in the meeting agenda was *Audrey Van Dyke v. Racine County, Docket No. 08-L-02*. The Board voted to unanimously to uphold the challenge on November 21, 2008. They directed Board Attorney Cheryl Furstace Daniels to prepare a draft written decision for their review, editing and signing at the next Board meeting on December 19, 2008. Attorney Daniels did so and sent the draft to the Board, Van Dyke, Noble and Racine County. The draft was posted on the Board's website and notice was given to interested persons that it was available to be seen.

The Board met by teleconference on December 19, 2008 to consider the draft decision in *Van Dyke v. Racine County, Docket No. 08-L-02*. After review and edits, the Board voted unanimously to approve and sign the decision.

Therefore, based upon the record in the matter, including the record submitted by the County and the statements of position by Van Dyke and the County, the Board issues the following decision.

ISSUES FOR DECISION

1. Does the Noble application, in regards to nutrient management, comply with the standards set under s. 93.90(2)(a), Wis. Stats. and s. ATCP 51.16(1), Wis. Adm. Code?
2. What should the Board's decision be in regards to the individual challenges, involving s. ATCP 51.16, Wis. Adm. Code and NRCS 590, of the aggrieved person's statement of position?
3. What should the Board's decision be in regards to the individual challenges involving Racine County Ordinance 20-1266(12)?

RELEVANT STATUTES AND RULES

S. 93.90 Livestock facility siting and expansion.

(2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. . .

(3) POLITICAL SUBDIVISION AUTHORITY.

(ae) A political subdivision that requires a special exception or conditional use permit for the siting or expansion of any of the following livestock facilities shall require compliance with the applicable state standards under sub. (2)(a) as a condition of issuing the special exception or conditional use permit:

1. A new or expanded livestock facility that will have 500 or more animal units.

(5) REVIEW OF SITING DECISIONS. (a) In this subsection "aggrieved person" means a person who applied to a political subdivision for approval of a livestock facility siting or expansion, a person who lives within 2 miles of a livestock facility that is proposed to be sited or expanded, or a person who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.

(b) An aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards under sub. (2)(a) that are applicable to the livestock facility siting or expansion or violated sub. (3), by requesting the board to review the decision. . .

(bm) Upon receiving a request under par.(b), the board shall notify the political subdivision of the request. The political subdivision shall provide a certified copy of the record under sub. (4) to the board within 30 days after the day on which it receives the notice.

(c) Upon receiving the certified copy of the record under par. (bm), the board shall determine whether the challenge is valid. The board shall make its decision without

deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4)(b). . . The board shall make its decision within 60 days after the day on which it receives the certified copy of the record under par. (bm), except that the board may extend this time limit for good cause specified in writing by the board.

(d) If the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision. The decision of the board is binding on the political subdivision, subject to par. (e). If a political subdivision fails to comply with a decision of the board that has not been appealed under par. (e), an aggrieved person may bring an action to enforce the decision.

Chapter ATPC 51 LIVESTOCK FACILITY SITING

ATPC 51.16 Nutrient management. (1) NUTRIENT MANAGEMENT STANDARD. (a) Except as provided in par. (c):

1. Land applications of waste from a livestock facility approved under this chapter shall comply with NRCS nutrient management technical standard 590 (September, 2005), except for sections V.A.2.b.(2), V.D., V.E. and VI.

(2) PRESUMPTION. For purposes of local approval, an operator is presumed to comply with sub. (1) if the application for local approval complies with s. ATPC 51.30.

ATPC 51.30 Application. (1) GENERAL. If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(5) COMPLETE APPLICATION. Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

ATPC 51.34 Granting or denying an application. (1) GRANTING AN APPLICATION. Except as provided in sub. (2), a political subdivision shall grant an application under s. ATPC 51.30(1) if all of the following apply:

- (a) The application complies with s. ATPC 51.30.
- (b) The application contains sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility

meets or is exempt from the standards in subch. II. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

(3) WRITTEN DECISION. (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

(4) TERMS OF APPROVAL. An approval under sub. (1) is conditioned on the operator's compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision's authority to do any of the following:

- (a) Monitor compliance.
- (b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:
 - 1. The operator materially misrepresented relevant information in the application for local approval.
 - 2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.
 - 3. The livestock facility fails to comply with applicable standards in subch. II.

FINDINGS OF FACT

1. On March 16, 2008, updated May 8, 2008, Noble View Farms LLC filed an application for local approval with Racine County for an expansion of its livestock facility to a 728 animal unit dairy cattle operation.
2. On May 14, 2008, the county advised Noble that the application was complete under s. 93.90(4)(a), Stats.
3. On May 16, 2008, the County sent notification to adjacent landowners of the Noble application.
4. Racine County also accepted written testimony until May 23, 2008, regarding the Noble View Farms application.
5. On June 16, 2008, Racine County held a public hearing where it accepted testimony regarding Noble View Farms' application
6. On June 16, 2008, the Racine County Economic Development and Land Use Planning Committee unanimously approved Noble's application.

7. On July 1, 2008, Racine County sent a letter to Noble stating that the notice for the hearing may have not met all the legal requirements. Therefore, the application was being resubmitted to the committee.
8. On July 11, 2008, Racine County sent a letter to Noble informing them that the application was complete and a new hearing was set for August 18, 2008.
9. On July 17, 2008, Racine County gave Notice to the adjacent landowners of the application filing and its completion for Noble View Farms LLC.
10. On July 30, 2008, Racine County sent a notice of hearing to adjacent landowners of Noble View Farms LLC.
11. On August 18, 2008, the Racine County Economic Development and Land Use Planning Committee heard testimony on the Noble View Farms conditional use petition. Following testimony, the Committee voted unanimously to approve the conditional use petition.
12. On August 25, 2008, Racine County issued a written decision approving Noble's application for a conditional use permit for expansion of its' livestock facility under s. 93.90, Stats., and chapter ATPC 51, Wis. Adm. Code.
13. On September 25, 2008, Audrey Van Dyke filed a challenge with the Board concerning Racine County's granting of the conditional use permit to Noble View Farms LLC. She included a statement of position with her challenge.
14. On September 25, 2008, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the County, with copies to Van Dyke and Noble, stating that the Board would take up Van Dyke's challenge within 60 days of receiving the certified record from the County.
15. On October 31, 2008, the County sent a copy of its record, with a certification, as well as a statement of position. However, the certified record did not include either the applicant's Environmental Training Plan or Emergency Response Plan as part of the application.
16. On November 21, 2008, the Board met and took up *Van Dyke v. Racine County*, Docket No. 08-L-01.
17. On November 21, 2008, the Board voted unanimously to uphold the challenge of Van Dyke to Racine County's granting of a conditional use permit for an expanded livestock facility for Noble View Farms LLC.

CONCLUSIONS OF LAW

1. The standards to be applied in this matter are those under s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code.
2. The challenge to Racine County's granting of a conditional use permit to Noble View Farms is valid because the application does not demonstrate compliance with the nutrient management standards established under s. 93.90(2)(a), Stats., and s. ATCP 51.16(1), Wis. Adm. Code. Therefore, the application is not complete, credible and internally consistent and the applicant has not satisfied that standard to receive the license.
3. Specifically, the application does not reflect that the amount of land available to spread the manure volumes calculated to be generated by the maximum number of animal units, meets the standard for nutrient management.
4. The Board will not take up the individual challenges in the aggrieved person's statement of position, numbers 1-25, because the Board generally addressed these issues in its decision under Conclusions of Law 2 and 3.
5. The Board does not have jurisdiction to take up issues number 26-29 of the aggrieved person's statement of position since the ordinance is not one adopted as more stringent than state standards under s. 93.90(3)(ar), Stats.
6. The Board will not take up the issue of the missing Environmental Training Plan and Emergency Response Plan as these were not challenged by the aggrieved person.

OPINION OF THE BOARD

The record in this case was clear and easy to follow. The decision the Board had to make was the next step after *Stadler v. Crawford County*, Docket No. 08-L-01.

Fundamentally, the question is how to interpret the Board's decision in that case as to when and how the applicant should show that its acreage for nutrient management was able to handle all of the waste generated by the maximum number of animal units in the application of the livestock facility operator. This question generated a great deal of discussion by the Board.

In the end, the Board decides that, under s. 93.90, Stats., the law requires the applicant to have all of this information in its application. If the application is complete with all of the required information, so that then the application is internally consistent and credible as to how the applicant will meet the standards under ch. ATCP 51, Wis. Adm. Code, the applicant has assurance that the permit should be granted without regard to other factors. This is the balance or tradeoff that the new statute required for these complex and, sometimes, contentious decisions.

It should be noted that the Board discovered some missing documentation in the application. While those missing plans were not part of the challenge to the approval of the permit, the Board requests from the local political subdivision in a challenge to provide the entire record of the application, including all elements, whether part of the challenge or not. For the future, applicants must provide all parts of the application, for it to be considered complete and the political subdivision must send the entire application to the Board when requested as part of an appeal.

ORDER

NOW, THEREFORE, IT IS ORDERED, pursuant to s. 93.90(5)(d), Stats. The granting of the livestock siting expansion permit to Noble View Farms LLC for a 728 animal unit facility by Racine County, voted on August 18, 2008 and written on August 25, 2008, is reversed.

DRAFT

Dated this _____ day of _____, 2008.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair _____

Andrew Johnson, Vice Chair _____

Robert Selk, Secretary _____

Fran Byerly _____

Lee Engelbrecht _____

Jerome Gaska _____

Robert Topel _____